IN THE

SUPREME COURT OF THE UNITED STATES

DOCKET No. 76-1204

FELIX WALLS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CASES CITED

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 29, 1976.

CITATIONS OF OPINIONS BELOW

THE JUDGMENT OF THE DISTRICT COURT DENYING PETITION FOR HABEAS CORPUS pursuant to Title 28 U.S.C., Sec. 2255 April 7, 1975. Decision of the Court of Appeals affirming the District Court June 29, 1976.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, Sec. 1254 (1) U.S.C.

ISSUES PRESENTED FOR REVIEW

1. Whether a prisoner, in proper federal custody, may be released by the Federal Court to serve a State sentence before serving an imposed federal sentence?

Petitioner answers, "No."

2. Whether a prisoner is properly committed to federal custody where the sentencing judge does not substantially comply with Rule 32 (B) (1) Federal Rules of Criminal Procedure, does not make a proper judgment and commitment and usurps authority vested in the Attorney General of the United States by designating the prisoner's place of confinement.

Petitioner answers, "No."

3. May the trial judge "sua sponte" orally correct an improper sentence without simultaneously amending the prisoner's corresponding period of incarceration?

Petitioner answers, "No."

4. May material changes in an indictment be made affecting the rights of an accused on the mere stipulation and acquiescence of defense counsel?

Petitioner answers, "No."

STATEMENT OF RELEVANT FACTS

This is a request for review of an Order of the Sixth Circuit Court of Appeals affirming the decision of the District Court for the Eastern District of Michigan denying Petitioner's Petition for Vacation of his sentence pursuant to the provisions of Title 28, Sec. 2255 U.S.C.

Appellant was first convicted in this cause in the District Court for the Eastern District of Michigan, Southern Division in June, 1970 and sentenced to two (2) concurrent ten (10) year terms to run consecutive to an existing four year federal sentence appellant was serving at that time.

Said conviction was reversed and remanded for new trial. *U. S.* v. *Walls,* 443 F. 2d 1220 (CA 6, 1971).

A second trial of this matter resulted in a mistrial December 14, 1971.

During the interval between the first and second trials, appellant completed his time on the four-year federal term and had commenced serving the two (2) concurrent ten-year terms before the first conviction was reversed June 14, 1971.

The third trial in this matter commenced November 30, 1972. Before the starting of the trial and without the presence or knowledge of appellant, a stipulation was entered into, in chambers, to strike certain names and a substantive part of Count I from the Indictment. (See Page 9 Transcript of third trial). Said agreement was made a matter of record before the trial started.

The District Court proceeded to sentence appellant February 7, 1973, pursuant to the jury verdict. Neither of appellant's two (2) trial attorneys of record was present for the sentencing, however, appellate counsel was there, expressly as an observer of the sentencing.

The District Court proceeded to sentence appellant as follows: (Tr. 4, Exh. 1 App.)

> "On December 5, 1972, a petit jury returned a verdict of guilty against the defendant Felix Walls on two counts of an indictment for his violation of Section 4704 (A) of Title 26 and Section 174 Title 21 United States Code. *By Order of this Court,* the defendant Felix Walls is sentenced to ten years on Count I and ten years on Count II of the above mentioned conviction. The ten years of Count I is to run concurrent with the ten years in Count II."

(Continuing Tr. 6) [1]

> "On August 4, 1969, a seven and one half to fourteen years sentence was duly imposed on Felix Walls by the Genessee County Circuit Court for the state crime of uttering and publishing a forged security agreement. This conviction was affirmed by both the Michigan Court of Appeals in 1970 and the Michigan Supreme Court in 1972.
>
> "There remains time to be served on this sentence by the defendant. *It is by Order of this Court that the defendant be remanded to the custody of the Genessee County Sheriff or his authorized representative for purpose of the defendant's serving the remainder of that state sentence."* (Emphasis added)

The instant 2255 Petition was considered by the District Court April 7, 1975. Defense counsel called to the court's attention that federal documents indicated that the appellant was being held under a "Court Commitment" rather than a "Federal Commitment" as required by law. (Tr. 2 and 3). Counsel pointed out that the District Attorney from East St. Louis, Illinois acknowledged that the Order of the District Court did not contain an adjudication. (Tr. 3 and 4).

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[1] "Tr." references are concerning the transcript of proceedings on the 2255 Petition before Judge Charles W. Joiner April 7, 1975.

Defense counsel argued that once the District Court ordered that appellant be committed to state authorities, he, the District Judge, lost jurisdiction to do anything further with appellant, because Congress only gave power to District Courts to commit a person to be incarcerated to the custody of the Attorney General of the United States. (Tr. 6 and 7).

After a review of the facts concerning appellant's federal custody, the District Judge acknowledged that appellant was in federal custody at the time sentence was imposed February 7, 1973. (Tr. 20 and 21).

Defense counsel argued that the effort of the Court to require appellant to stop serving his federal sentence, which he was then serving, and to embark upon the state sentence, was a clear attempt by the District Court to enhance the duration of the sentence previously imposed by Judge Kaess, the first trial judge, for the same offense wherein there were no new matters brought to the Court's attention which would warrant an enhanced sentence. (Tr. 8 and 9).

Defense counsel further argued that since the District Court attempted to sentence appellant via an Order, as opposed to a "Judgment and Commitment," Title 18, Section 3651 restricts the extent of such commitment to a period of six (6) months. (Tr. 8 and 9).

The District Court acknowledged the issues raised to be: (1) Whether a federal judge has power to postpone the beginning of a federal sentence until a state sentence has been served in a case in which the person is at the time of sentence in federal custody, and (2) Whether he made a proper "Judgment and Commitment" at the time of sentencing. (Tr. 18).

Government counsel inquired, how is the defendant prejudiced in the manner in which the Court imposed sentence upon him. (Tr. 24 and 25).

Defense counsel responded that appellant was prejudiced in that his sentence was increased because of what the Court did. (Tr. 25 and 26).

After hearing arguments from both sides, the Court spoke about his sentencing order, as follows: at Tr. 36

> "The particular document that was filed in connection with that sentence is, *indeed, a peculiar document. It is different than any sentence that I have ever seen.* It's one that I signed, and maybe it's one that I prepared. I wouldn't be surprised. I really don't have any recollection of having prepared it, but *I am certainly not going to push the blame off onto anybody else at this time.*" (Emphasis added)

After considering a number of alternative approaches to reach the sentence the Court had in mind at the time of sentencing (Tr. 36-40) the Court proceeded to orally correct his error as follows: Tr. 40

> "If there is any question about the fault of the document as to the failure to specifically adjudge that the defendant is guilty as charged and convicted, it seems to me that there can be no question about that.
>
> *"I would at this time simply state that it is the judgment of the court that the defendant was adjudged and is adjudged — the defendant is guilty as of that time and as charged and convicted."* (Emphasis added)

REASONS FOR GRANTING WRIT

I.

A PRISONER, IN PROPER FEDERAL CUSTODY MAY NOT BE RELEASED BY THE FEDERAL COURT TO SERVE A STATE SENTENCE BEFORE SERVING AN IMPOSED FEDERAL SENTENCE.

In the instant cause, the District Court, by ORDER, committed Petitioner from federal custody to state authorities to serve a state sentence before commencing service of the federal sentence imposed. The actions of the District Court undisputeably enhanced the period of time Petitioner would have to serve for the two separate jurisdictions following his successful appeal of the first conviction in the instant cause.

Clearly, the actions of the District Court were against the grain of existing law, where no new matters concerning the Petitioner's behavior were called to the Court's attention, warranting an enhanced sentence. *Torrance* v. *Henry*, 304 F. Supp. 725; *People* v. *Winslow*, 312 N.Y.S. 2d 495; *North Carolina* v. *Pearce*, 395 U.S. 711; *U. S.* v. *Coke*, 404 F. 2d 836; *North Carolina* v. *North*, 381 F. 2d 636; *Gilbert* v. *U. S.*, 401 F. 2d 507. The Court's actions effected a denial of Petitioner's constitutional right to equal protection of the laws.

Subsequently, the same judge that sentenced Petitioner, in this cause, and denied Section 2255 relief, had an opportunity to consider the same issue as raised herein. The Court's decision in that case was clearly inconsistent with his decision in the instant cause. (See *Stroble* v. *Egeler*, 408 F. Supp. 630)

In *Stroble,* supra, the Petitioner was serving a sentence in New York for crimes he was convicted of in that State. The State of Michigan brought him back for trial on old warrants pending against him before the New York offenses under the Interstate Agreement on detainers. Stroble was convicted of the offenses in Michigan and sentenced to life imprisonment. Thereafter, he was returned to New York for trial on other offenses in that State and was acquitted. Thereupon, he was returned to Michigan to resume the life sentence. In *Stroble,* Judge Joiner said, at 635:

> "The record is clear that Michigan authorities erred in sending petitioner to Jackson on December 20th rather than to a jail or temporary facility. Moreover, respondent's answers to interrogatories indicate that Michigan authorities considered Stroble to have begun serving his murder sentence at Jackson on that date. Petitioner relies on People ex rel Barrett v. Bartley, 383 I 11.437, 50 N.E. 2d 517 (1943), in support of his claim that Michigan voluntarily released him to New York in February, 1969, and thereby waived service of his sentence. Bartley held that where a prisoner begins serving a sentence in one State which interrupts service of the sentence to surrender the prisoner to another State for service of another sentence, the sending State thereby relinquished jurisdiction over the prisoner, in effect pardoning the prisoner."

The Court went on to distinguish *Stroble* from *Barrett* v. *Bartley,* 383 Ill. 437, 50 N.E. 2d 517 (1943). While we do not find the Court's purported distinction to be a real distinction at all, we do submit that the overall context of the Court's decision clearly encloaks the instant cause.

Article II of the Interstate Agreement On Detainers Subparagraph (a) mandates that "State" shall mean a

state of the United States; *the United States of America.* (Emphasis Added)

In the instant cause, Petitioner commenced serving his Federal sentence in 1970, which was reversed in 1971. *U. S.* v. *Walls,* 443 F. 2d 1220. The District Court acknowledged that Petitioner was properly in Federal custody during his third trial and subsequent sentencing. Accordingly, by the Court's own decision in *Stroble,* supra, he lost jurisdiction to require Petitioner to serve the sentence he is now serving in a Federal Institution, after having now completed service of an intervening State Sentence.

Unlike the situation in *Stroble* where it was not clear what the "sending state" intended, here, the Court specifically directed that the Petitioner be released from Federal custody to serve a State Sentence while Petitioner was then serving a Federal Sentence; thereby pardoning the Federal Sentence pursuant to *Barrett* v. *Bartley,* supra.

For the reasons asserted herein, Petitioner is clearly being held in Federal custody illegally.

II.

A PRISONER IS NOT PROPERLY COMMITTED TO FEDERAL CUSTODY WHERE THE SENTENCING JUDGE DOES NOT SUBSTANTIALLY COMPLY WITH RULE 32(B)(1) FEDERAL RULES OF CRIMINAL PROCEDURE, DOES NOT MAKE A PROPER JUDGMENT AND COMMITMENT AND USURPS AUTHORITY VESTED IN THE ATTORNEY GENERAL OF THE UNITED STATES BY DESIGNATING PETITIONER'S PLACE OF CONFINEMENT.

The District Court committed appellant to the custody of state authorities to serve a state sentence, instead of back to the custody of the Attorney General of the United States. This, he was not empowered to do.

The jurisdiction of the United States District Courts may be found in Title 28, Sections 1331-1359 U.S.C. and as to crimes and offenses, Title 18, Section 3231 U.S.C. It is clear that a United States District Judge has no power or authority to act except what is expressed by Congress through statutes or by Court Rules. Moreover, it is clear from a reading of the statutes that Congress in no way intended to infringe upon the rights of the states to enforce their laws by vesting certain powers in the District Courts.

Federal Courts and State Courts represent two (2) separate and distinct sovereigns. Neither has an independent right to encroach upon the functioning of the other. Accordingly, a federal judge would have no right to order a citizen to do anything outside of the perimeter of federal authority, as the Court here ordered the appellant to serve a sentence for having committed a state offense.

In *Ponzi* v. *Fessenden,* 258 U.S. 254, 42 S. Ct. 309, 66 L. Ed. 607, the United States Supreme Court held that —

"Under the rule of comity prevailing under our system of two courts having jurisdiction in the same territory, the Court which first takes the subject matter of the litigation into its control, *whether the subject matter be person or property,* must be permitted to exhaust its remedy, to attain which it assumed control, before the other Court shall attempt to take it." See also, *U. S. ex rel. Strewl* v. *Warden of Clinton Prison at Dannemora,* 21 F. Supp. 502; *U. S.* v. *Wells,* 1872 Fed. Case No. 16,665; *State* v. *Chinault,* 40 P. 662, 55 Kan. 326. (Emphasis Added.) Likewise, see *Godwin* v. *Looney,* 250 F. 2d 72, wherein it was held that a Federal Court had no power to commit a person to a state penitentiary, which is just what the District Court did in the instant case.

In *U. S.* v. *Herb,* 436 F. 2d 566, 568 (CA 6, 1971), the Court held that the District Court had no authority to honor a defendant's request that he be delivered to state authorities so that his federal sentence could run concurrent with a state sentence. It is clear from the holding of the Court that a District Judge would have no power to designate that a convicted offender, by his own Order, serve time in a state penitentiary. As the Court pointed out at page 568 — "The Attorney General was vested with the exclusive discretion in the designation of his place of confinement."

As pointed out by the Court in *Herb,* supra, Title 18, Section 4082 U.S.C. mandates that:

> "A person convicted of an offense against the United States *shall* be committed, for such term of imprisonment as the court may direct, *to the custody of the Attorney General of the United States, who shall designate the place of confinement* where the sentence shall be served." (Emphasis Added)

The law is clear that the District Court had no authority to commit appellant to the custody of the Genessee County Sheriff, as he did, because such a commitment would be tantamount to designating the place of confinement, which is vested exclusively with the Attorney General.

Rule 32 of the Federal Rules of Criminal Procedure deals with "Sentence and Judgment." Rule 32 (b) (1) specifically sets out the procedure to be employed by the District Courts of the United States after verdict as follows: (See also, Title 18, Sections 3771 and 3772 U.S.C.)

> "A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the Judge and entered by the clerk."

In the instant cause, the Court proceeded to sentence appellant via a "Court Order," rather than the regular "Judgment and Commitment." While we concede that the label placed on the entitlement of the document is not probatively significant, we submit that the substantive part of the commitment order is deficient, as a matter of law, by virtue of the failure of the embodiment thereof to contain sufficient matter to comply with Rule 32 (b) (1) Federal Rules of Criminal Procedure.

As noted by the District Attorney at East St. Louis, Illinois, the Court's Order does not contain an adjudication. (Tr. 3). Moreover, the District Judge himself observed "The particular document that was filed in connection with that sentence is, "indeed, a peculiar document. It is different than any sentence that I have ever seen." (Tr. 36). It is clear from the fact that the Court's further reference about where the *blame* should be laid, that he

believed that the Order as recorded, was not in compliance with the law because there is no *blame* to be assigned where there is no error.

The law is well settled that a proper Judgment and Commitment must be entered in the Court record, before anything is final for appellate purposes. *U. S.* v. *Batista,* 418 F. 2d 572; *Cloyde* v. *Richardson,* 510 F. 2d 485 (CA 6, 1975) ; *Indrelumas* v. *U. S.,* 411 U.S. 221, 93 S. Ct. 1562; *U. S.* v. *Hansel,* 474 F. 2d 1120; *U. S.* v. *Hark,* 320 U.S. 531, 534, 64 S. Ct. 359, 88 L. Ed. 299. It is clear from the conglomeration of confusion that has existed since the aborted sentencing by the District Court February 7, 1973, appellant has not had his right to appeal a final appealable order of the District Court on the merits of his conviction.

III.

A TRIAL JUDGE MAY NOT "SUA SPONTE" ORALLY CORRECT AN IMPROPER SENTENCE WITHOUT SIMULTANEOUSLY AMENDING THE PRISONER'S CORRESPONDING PERIOD OF INCARCERATION.

The Court, recognizing his error in this cause, attempted to correct same by oral pronouncement. (Tr. 40). Such a vain attempt is clearly ineffective. *Cloyde* v. *Richardson,* supra; *United States* v. *Indrelumas,* supra; *United States* v. *Batista,* supra. The judge could only correct such an error via the entry of a formal judgment and commitment. However, the Court's action in attempting to correct the error by oral pronouncement in open Court manifests that he must have felt correction was necessary.

It is significant to note that even in the attempted oral correction, the Court still failed to commit appellant to the custody of the Attorney General of the United States, which he must do under Title 18, Section 4082 U.S.C.

We submit that since the appellant has never been properly committed, by the Court, to the custody of the Attorney General in this cause, his incarceration at a designated federal institution is clearly illegal.

In the instant cause, counsel representing the respective litigants agreed in chambers to stipulate to strike the names of two (2) co-defendants and an allegation respecting the possession of cocaine in Count I of the Indictment. Appellant was not present when said agreement was entered and upon entering the Courtroom, the agreement was placed on the record. The record does not reflect acquiescence by appellant. Accordingly, such a stipulation would be void as not being a knowing and voluntary waiver by appellant to be tried on the indictment of the Grand Jury.

Johnson v. *Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 461.

Suffice it to say that the Government had more than ample time to secure a superseding indictment in this cause, reflecting the requested changes. This cause had been pending since April, 1969, almost four (4) years before the third trial. As early as December 4, 1971, the Government had made the same motion to strike, which was objected to by then defense counsel. (See Transcript of second trial and third trial at page 248.)

IV.

MATERIAL CHANGES MAY NOT BE MADE IN AN INDICTMENT AFFECTING THE RIGHTS OF AN ACCUSED ON THE MERE STIPULATION AND ACQUIESCENCE OF DEFENSE COUNSEL.

We submit that appellant was not properly tried on the indictment of the Grand Jury, which he had a right to be. *Ex Parte Bain,* 121 U.S. 1 (1887); *Lord* v. *U. S.,* 273 U.S. 593.

CONCLUSION

Because of the several errors herein assigned, this Honorable Court should GRANT CERTIORARI to review the decisions of the Courts below.

Respectfully submitted,

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APPENDIX

No. 75-1927

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FELIX WALLS,
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ORDER

(Filed June 29, 1976)

Before: PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

This appeal, perfected from an order denying petitioner-appellant relief under a motion to vacate an order entered pursuant to jury verdict finding him guilty of narcotics violations under 26 U.S.C. § 4704 (a) and 21 U.S.C. § 174, has been submitted on the record on appeal and on the briefs and oral arguments of counsel for the parties. The court being fully advised in the premises concludes that appellant's contentions are either without merit or are not cognizable under 28 U.S.C. § 2255, and accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

No. 76-1204

In the Supreme Court of the United States

OCTOBER TERM, 1976

FELIX WALLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1204

FELIX WALLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this collateral attack upon a criminal conviction, the court of appeals entered its judgment on June 29, 1976 (Pet. App. 1a). No petition for rehearing was filed. The time within which to file a petition for a writ of certiorari was not extended, and it therefore expired on September 27, 1976. See 28 U.S.C. 2101(c). The petition for a writ of certiorari was not filed until March 1, 1977, and is therefore jurisdictionally out of time. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

DOJ-1977-03